No. 09-1343

IN THE

Supreme Court of the United States

J. MCINTYRE MACHINERY LTD.,

Petitioners,

v.

ROBERT NICASTRO, ET UX.,

Respondents.

On Writ of Certiorari
To the Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE WORKERS' INJURY LAW & ADVOCACY GROUP IN SUPORT OF RESPONDENTS ON THE MERITS

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INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae Workers' Injury Law & Advocacy Group [WILG] is an organization dedicated to protecting and advocating the rights of injured workers throughout the United States. WILG has substantial common interests in ensuring that the rights of injured workers are not diminished further by their inability to bring a third party foreign defendant to Court in the jurisdiction where the injury occurs and/or where the injured worker resides. When a foreign defendant purposefully avails itself of the privilege of conducting activities within the forum state, then that foreign defendant must be subject to the jurisdiction of the Court in that forum state.

Workers' compensation is a form of insurance that provides medical care and compensation for workers who are injured in the course of employment, while abrogating the worker's right to sue their employer for the tort of negligence. While schemes differ between jurisdictions, provision can be made for weekly payments in place of wages, compensation for economic loss (past and future), reimbursement or payment of medical and like expenses, and benefits payable to the dependents of workers killed during employment. Cash benefits are established by state formulas with maximum benefit levels. The benefits are administered on a state level, primarily by the state department of labor.

Workers' Compensation Acts across the country are a

[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under S. Ct. Rule 37.6, *amicus curiae* states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the amicus curiae, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission

heavily bureaucratic, adversarial system that generally short change injured workers. A. Widman, Workers' Compensation A Cautionary Tale, p. 2 (2006). To the extent that workers' compensation rate reductions have occurred, such rate reductions come at the expense of the injured workers, because lawmakers slash benefits and push many of the injured workers out of the system and into other social programs, such as social security disability, Medicare, Medicaid, and group health insurance. A. Widman, Workers' Compensation A Cautionary Tale, p. 2 (2006).

"Workers' compensation is an unfortunate example of how a seemingly fair program can be manipulated by political forces into a nightmare for those it was originally meant to help. Once an area of law is removed from the civil justice system, it becomes vulnerable to money, politics, and influence-peddling. This happens either through aggressive industry lobbying of legislators, political influence on the agencies charged with implementing the system, or orchestrated media efforts. All have happened to workers' compensation." A. Widman, Workers' Compensation A Cautionary Tale, p. 3 (2006).

"Once a workers' compensation act has become applicable either through compulsion or election, it affords the exclusive remedy for the injury by the worker or the worker's dependents against the employer and insurance carrier. This is part of the *quid pro quo* in which the sacrifices and gains of workers and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, it is relieved of the prospect of large damage verdicts." 6-100 Larson's Workers' Compensation Law § 100.01.

"The operative fact in establishing exclusiveness [of jurisdiction] is that of actual coverage, not of election to claim compensation in the particular case." 6-100

Larson's Workers' Compensation Law § 100.01. Even if the worker has never made application for compensation, the worker's right to sue his or her employer at common law is barred by the existence of the compensation remedy. *Sedore v. Sayre*, 119 N.Y.S.2d 204 (Sup. Ct. 1953). If the Compensation Commission has made a valid and unappealed award for compensation, this is res judicata on the issue of coverage, and is binding on the court in which the worker attempts to bring his or her common-law suit. *Riggins v. Stong*, 238 A.D.2d 950, 661 N.Y.S.2d 170 (1997); *Ogino v. Black*, 304 N.Y. 872, 109 N.E.2d 884 (1952).

In 1972, the Nixon Administration appointed a bi-partisan commission that produced a unanimous Report of the National Commission on State Workers' Compensation Laws. The Commission declared that "[t]he inescapable conclusion is that State workers' compensation laws in general are inadequate and inequitable. The report listed nineteen 'essential recommendations,' all of which focused on expanding benefits to workers: eight recommendations dealt with expanded coverage; nine with increased disability benefits; and two with improvements to medical and rehabilitation benefits." McCluskey, Martha T., "The Illusion of Efficiency in Workers' Compensation 'Reform'," 50 Rutgers L. Rev 657 (1998), n. 88, 89 (1998), citing, "The Report of The National Commission on State Workmen's Compensation Laws," Washington D.C., July 1972. The commission was made up of representatives from business, labor, insurance, the medical profession, academics, and the public. These recommendations were to further the following goals:

—Broad coverage of workers and of work-related injuries and diseases;

—Substantial protection against interruption of income;

—Provision of sufficient medical care and rehabilitation services;

—Encouragement of safety;

—An effective system for delivery of benefits and services.

"The Report of The National Commission on State Workmen's Compensation Laws," Washington D.C., July 1972.

The rights of injured workers continue to legislatively diminish in the workers' compensation arena. Preserving the rights of injured workers requires vigilant protection. The right to sue is a cherished right – an inalienable right. Only tort claims provide a full and possibly fair recovery of the type forfeited by injured workers when the *quid pro quo* establishing workers' compensation systems were originally established. If foreign defendants, who purposely avail themselves of the United States market, avoid jurisdiction in the forum where the injury occurs, then workers across the country who sustain injures due to these defective products, will be denied complete justice.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SUMMARY OF ARGUMENT

Each state devises its own workers' compensation system, and state statutes and court decisions guide most of the restrictions and requirements. While each state has its own laws, the following general concepts apply to most workers' compensation systems:

1) When a worker is hurt, workers' compensation is the exclusive remedy against an employer. Lawsuits against employers are generally not allowed. Although if another party causes the injury, such as the manufacturer of defective equipment, suits against this other party are still allowed except against foreign defendants who place defective goods in the stream of commerce in the United States and hide behind jurisdictional limitations. Domestic and agricultural workers are usually excluded, as are some federal workers. McCluskey, Martha T., "The Illusion of Efficiency in Workers' Compensation 'Reform'," 50 Rutgers L. Rev 657, 670-671, n. 34, 35 (1998).

2) "Two types of compensation are generally allowed: medical benefits and disability benefits (for lost earnings, divided by duration and severity: temporary, permanent, partial, total). Some programs provide limited death benefits. Id. at n. 37-39. No compensation is allowed for pain and suffering." A. Widman, Workers' Compensation A Cautionary Tale, p. 5 (2006).

3) In the case of some disabilities, state lawmakers enact by statute a fixed schedule of benefits (so much for an eye or leg based on a fixed number of weeks). These schedules ignore actual or projected economic loss. 1-1 Larson's Workers' Compensation Law Scope.

4) "If a worker is injured, [she or he] files a claim with the state workers' compensation agency that oversees administration of the system. Almost all states require that the injured worker notify the employer promptly of

any injury. Usually an informal resolution procedure begins. Many times, however, the claim will be contested in some way, and at this point a more formal adjudicative administrative process begins before the state's workers' compensation board." A. Widman, Workers' Compensation A Cautionary Tale, p. 5 (2006).

5) "Once the board reaches a decision, a court may only review that decision on questions of law. In other words, an administrative decision may not be appealed to a court purely on the grounds that the administrative court found certain facts to be right or wrong, i.e., a determination of type of injury or duration of benefits." A. Widman, Workers' Compensation A Cautionary Tale, p. 5 (2006).

6) "Generally, employers pay premiums to an insurance company or self-insured fund, and, when a worker is injured, [she or he] receives compensation from the insurance company or fund." A. Widman, Workers' Compensation A Cautionary Tale, p. 5 (2006).

7) "There are three mechanisms for administering workers' compensation benefits: a purely state-run system, a state-run system that competes with private insurers, and a purely privately run system. The trend is toward more privately-run systems." A. Widman, Workers' Compensation A Cautionary Tale, p. 5 (2006).

Workers' compensation benefits generally are inadequate using the standard of two-thirds gross wage replacement and policy solutions should be tailored to overcome the inadequate remedies available to the injured worker, the employers, the insurance companies, and ultimately the consumers, who absorb the costs of injuries through the purchase price increase of the products. Comparing the outcomes for injured workers with those of their uninjured counterparts provides a simple

and understandable measure of actual wage loss. By allowing the injured worker to pursue an action against a foreign defendant who places a defective product in the stream of commerce is a logical and cost effective method of equalizing the compromises to which the injured worker, the employer, the insurance carrier, and ultimately the consumer, must adhere. Such a policy will promote equality among the parties, and adhere to the workers' compensation bargain between the injured worker, the employer, and the insurance company. Due process and justice will be served only when the parties are allowed to hold the party liable for the wreckage responsible in the local forum where the injury occurred.

If this Court precludes jurisdiction against foreign defendants who purposely avail themselves of the United States market, then workers across the country who sustain injures due to these defective products, will be denied complete justice. Only tort claims provide a full and possibly fair recovery of the type forfeited by injured workers when the *quid pro quo* establishing workers' compensation systems were originally established. Furthermore, with the *quid pro quo* bargain between the workers and the employers questioned due to the continuous legislative reduction in workers' compensation benefits, the natural progression of commerce cannot be allowed to further deteriorate the rights of the injured workers. Furthermore, the employers, insurance companies, and ultimately the consumers, will be excessively burdened when they must bear the cost of the inability to sue foreign defendants in the United States in a local forum and thereby must absorb the total loss to the United States work force incurred as a result. Additionally, the foreign defendants must be liable for injuries due to their defective products so that the manufacturers in the United States operate on a level playing field with equal liabilities and responsibilities for their

defective products. Constitutional challenges to the *quid pro quo* are mounting at the state level with the politicized and legislated reduction in workers' compensation benefits and/or deforms in the workers' compensation system occurring since 1990, thus the subtraction of even more normally available and previously contemplated tort claims is unconscionable—this is exactly what will occur if jurisdiction is denied.

ARGUMENT

I. PURPOSEFUL AVAILMENT OF THE MARKET OF THE UNITED STATES AS A WHOLE, WHICH CREATES GENERAL JURISDICTION OVER FEDERAL CLAIMS, ALSO CREATES SPECIFIC JURISDICTION IN A STATE IN WHICH THE HARM OCCURS AS A RESULT OF PURPOSEFUL AVAILMENT OF THE NATIONAL MARKET

A. HISTORICAL PURVIEW OF WORKERS' COMPENSATION

This Court, by granting review in these cases in tandem, has signaled a major doctrinal review which impacts the ability of the injured worker to obtain justice due to a defective product placed by a foreign manufacturer in the stream of commerce in the United States. We urge the Court to consider the rights of the injured workers in our great country when it contemplates this doctrinal review. As the New Jersey Supreme Court stated, "trade knows few boundaries, and it is now commonplace that dangerous products will find their way, through purposeful marketing, to our nation's shores and into our State."

"Workers' compensation is a mechanism for providing cash-wage benefits and medical care to victims of work-connected injuries, and for placing the cost of these injuries ultimately on the consumer, through the medium

of insurance, whose premiums are passed on in the cost of the product." 1-1 Larson's Workers' Compensation Law Scope. Historically, workers' compensation is distinguishable from "strict tort liability in its basic test of liability, which is work connection rather than fault; in its underlying philosophy of social protection rather than righting a wrong; in the nature of the injuries compensated; in the elements of damage; in the defenses available; in the amount of compensation; in the ownership of the award; and in the significance of insurance." 1-1 Larson's Workers' Compensation Law Scope.

Throughout the United States, a typical workers' compensation state act provides: (1) compensation to be paid when a worker sustains an injury as a result of an accident, specific traumatic incident, or occupational disease that arose out of and in the course of the employment; (2) weekly indemnity benefits are limited to an annual maximum and are limited to two-thirds or less of the gross weekly wages earned the year before the compensable injury; (3) negligence and fault are generally irrelevant; (4) death benefits are limited and arbitrary maximum and minimum limits are ordinarily imposed; (5) medical providers are generally selected by the employer or the workers' compensation carrier; (6) the right to sue third persons whose negligence caused the injury generally remains, however, the proceeds usually are applied first to the reimbursement of the employer for the indemnity and medical compensation paid for the injury and the balance reverts to the injured worker; (7) in some jurisdictions the weekly wage benefits are limited to a maximum number of weeks regardless of the continuing disability; and (8) indemnity benefits paid to an injured worker are reduced by a statutory percentage when the worker violates a safety regulation or in alternative increased when an employer violates a safety regulation. 1-1 Larson's Workers' Compensation Law § 1.01. The employer is

required to obtain private workers' compensation insurance, state-fund insurance in some states, or "self-insurance"; thus the burden of liability does not remain upon the employer but passes to the consumer, since workers' compensation premiums, as part of the cost of production, will be reflected in the price of the product. 1-1 Larson's Workers' Compensation Law § 1.01.

"The ultimate social philosophy behind compensation liability is belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product." 1-1 Larson's Workers' Compensation Law § 1.03.

For example, if a worker works for an employer and the employer has safety rules requiring the worker to wear a safety harness. The worker wears the safety harness and through no fault of the employer or of the worker the harness, manufactured in a foreign country, fails, injuring the worker. The law allows recovery by the worker and allows the worker to sue the manufacturer of the safety harness that fails. When the worker is precluded from bringing an action against the manufacturer in the forum where the injury occurs, or where the worker resides, not only the worker is harmed but also the employer, the consumer, and the workers' compensation carrier who all bear the risk of the injury sustained by the worker.

The ultimate policy behind no-fault workers' compensation liability is the importance of providing, in the most effective manner, indemnity and medical benefits which an enlightened society would feel obliged to provide in

any case in some less satisfactory form, and of allocating the burden of these payments to the most appropriate source. 1-1 Larson's Workers' Compensation Law § 1.03. To further limit the persons from whom an injured worker can recover and by limiting the injured worker's judicial forum, the rights of the injured worker would be further eroded.

The workers' compensation system contemplates that regardless of the precautions taken by an employer and by a worker, at some point a worker will sustain a work-related injury. At that juncture, the employer may be made to assume absolute liability for these injuries when they do occur. 1-1 Larson's Workers' Compensation Law § 1.03.

A workers' compensation system, unlike a tort recovery, does not pretend or intend to restore to the injured worker what he or she has lost. 1-1 Larson's Workers' Compensation Law § 1.03. The workers' compensation is a system of compromise between the worker and the employer, subject to the limitations discussed herein, and presumably enables a worker to exist following a work-related injury without being a burden to others. 1-1 Larson's Workers' Compensation Law § 1.03. For example, (1) the indemnity benefits paid to an injured worker terminate at the death of the injured worker, when the death is unrelated to the compensable injury by accident, specific traumatic incident, or occupational disease; (2) there are no damages paid for pain, for suffering, for loss of consortium, for loss of sexual potency, or for loss of child bearing capacity; and (3) there are limited damages for disfigurement and loss to an important internal organ. 1-1 Larson's Workers' Compensation Law § 1.03. However, it is important to understand that workers' compensation payments were never intended to equal actual loss. 1-1 Larson's Workers' Compensation Law §

1.03. These facts make it more critical for specific jurisdiction over a foreign defendant to be available to an injured worker, who is injured due to a defective product, manufactured by a foreign defendant, who makes purposeful availment of the market of the United States as a whole.

Likewise workers' compensation insurance's primary objective is to provide coverage for work related injuries and pass the expense of the injuries on to the consuming public in an orderly fashion. 1-1 Larson's Workers' Compensation Law § 1.03. Precluding specific jurisdiction over a foreign defendant denies not only the injured worker access to justice and equal protection under the law, but also denies access to justice and equal protection to the employer and the workers' compensation insurance company, who have paid benefits in the claim, and are thus allowed through a third party action to recoup their costs expended in these claims when the harm is caused by a defective product manufactured by a foreign defendant, who makes purposeful availment of the market of the United States as a whole. When all parties to the workers' compensation bargain are allowed the recovery from the source of the wreckage, and a chance to be made whole, when a third party foreign defendant is held responsible for the wreckage due to a defective product, then, and only then, will justice be achieved.

B. UNDER STATE WORKERS' COMPENSATION ACTS, THE INJURED WORKER IS GIVEN THE RIGHT TO PROCEED UNDER THE STATE ACT WHICH PROVIDES THE GREATER BENEFITS

It is generally held that an award under the Workers' Compensation Act of another state will not bar a proceeding under an applicable Act, unless the Act where the award was made was designed to preclude the recovery

of an award under any other Act, but the amount paid on a prior award will be credited on the second award. The development of the Magnolia, McCartin, and Thomas Doctrines have shaped the precedent for the greater recovery by an injured worker, all of which are subject to a credit on the second award.

The "Magnolia" Doctrine held on its facts that a prior Texas award of workers' compensation was a constitutional bar to a workers' compensation award in Louisiana of the amount by which the Louisiana benefits exceeded those allowed by Texas. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 64 S. Ct. 208, 88 L. Ed. 149, 150 A.L.R. 413 (1943), reh'g denied, 321 U.S. 801, 64 S. Ct. 483, 88 L. Ed. 1088 (1944).

The "McCartin" Doctrine provides that an award already had under the workers' compensation act of another state will not bar a proceeding under an applicable Act unless the Act where the award was made was designed to preclude the recovery of an award under any other Act, but the amount paid on a prior award will be credited on the second award. *Industrial Comm'n of Wis. V. McCartin*, 330 U.S. 622, 67 S. Ct. 886, 91 L. Ed. 1140, 169 A.L.R. 1179 (1947).

The "Thomas" Doctrine provides that the Full Faith and Credit Clause did not preclude successive workers' compensation awards, in as much as a state had no legitimate interest in preventing another state from granting supplemental compensation when that second state would have had the power to apply its own workers' compensation law in the first instance. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 100 S. Ct. 2647, 65 L. Ed. 2d 757 (1980); *Plater v. Kane Warehouse Co.*, 241 Md. 462, 217 A.2d 102 (1966) (worker regularly worked in Washington and Virginia, but was injured in Maryland; an award was made under the Maryland act, but worker also filed under

the Washington act, which provided greater benefits and was permitted to withdraw the Maryland claim and proceed under the Washington act); *D'Errico v. General Dynamics Corp.*, 996 F.2d 503 (1st Cir. 1993) (employer allowed an offset for benefits paid for the same injury under the Rhode Island Workers' Compensation Act when a later award was made under the Longshore and Harbor Workers' Compensation Act; it made no difference that the Rhode Island award was for disfigurement and the Longshore award for total disability since the same injury was involved); *Director, Office of Workers' Comp. Programs, U.S. Dep't. of Labor v. Boughman*, 545 F.2d 210, 178 U.S. App. D.C. 132 (1976) (worker was employed by a District of Columbia employer, but was injured while working in San Francisco; held that application of the District of Columbia workers' compensation statute, after California had already made an award, did not violate the full faith and credit clause of the constitution); *Sade v. Northern Natural Gas Co.*, 458 F.2d 210 (10th Cir. 1972) (worker injured in Nebraska, employed by an Oklahoma corporation, performing contract work with the defendant, a corporation with its main offices in Nebraska; worker entered into a compromise and settlement agreement with defendant, releasing all claims that he had against defendant as a result of the accident, then filed a workers' compensation claim in Oklahoma, which in turn was settled by the payment of a lump sum; held that despite claimant's acceptance of benefits under the Oklahoma workers' compensation law, he was not precluded from pursuing additional remedies he had under the laws of Nebraska, where the accident occurred, and therefore was entitled to bring this action for fraud); *Sager v. Royce Kershaw Co.*, 359 So. 2d 398 (Ala. Civ. App. 1978) (held that worker could pursue his suit in Alabama because he had, at least, a right of action to determine whether the Illinois payment was less than that

he would have recovered in Alabama, and because the possible issue of the settlement's rescission on the basis of a mutual mistake of fact had been presented); *Lowery v. Industrial Comm'n*, 123 Ariz. 108, 597 P.2d 1011 (Ct. App. 1979) (worker entitled to pursue his Arizona claim with his eventual recovery subject to an offset for benefits collected in New Mexico); *Kluttz v. Howard*, 228 Conn. 401, 636 A.2d 816 (1993) (worker, a North Carolina resident, was injured during the course of his employment in Connecticut, and he sought workers' compensation benefits in Connecticut; held that worker was eligible for Connecticut workers' compensation); *De Cancino v. Eastern Airlines*, 239 So. 2d 15 (Fla. 1970) (prior filing of a workers' compensation claim in New York held not to bar the filing of a claim and an award of benefits in Florida, where Florida did have jurisdiction over the accident, the only limitation being that credit would have to be given for any benefits received in New York); *Roadway Express, Inc. v. Warren*, 163 Ga. App. 759, 295 S.E.2d 743 (1982) (truck driver employed in Georgia, was injured in an accident in the course of his employment; obtained workers' compensation from Tennessee for four years, during which time he did not work for his employer; held that an award already received by a claimant under the compensation law of one state will not bar an award under an applicable act of another state, which has an adequate interest in the subject matter); *Goldblatt Bros., Inc. v. Industrial Comm'n*, 86 Ill. 2d 141, 56 Ill. Dec. 38, 427 N.E.2d 118 (1981) (an election of remedies held in Illinois to be permissible so long as there is no resulting threat of double compensation, the employer is not misled by the worker's act, and the doctrine of res judicata is not invoked); *Gulf Interstate Geophysical/Gulf Interstate Piping v. Industrial Comm'n*, 198 Ill. App. 3d 307, 144 Ill. Dec. 470, 555 N.E.2d 989 (1990) , reh'g denied (July 9, 1990) (worker twisted a knee while work-

ing on a pipeline in Indiana under a contract made in Illinois; paid temporary total disability and entered a settlement for permanent partial disability in Indiana; full faith and credit of the Indiana settlement was held to not bar a supplemental recovery under Illinois law since there was no "unmistakable language" in the Indiana Act to bar a supplemental recovery; Indiana settlement would be credited against any supplemental award in Illinois); *LeBlanc v. United Eng'rs & Constructors Inc.*, 584 A.2d 675 (Me. 1991) (various Maine residents who worked in New Hampshire had recovered workers' compensation benefits under that latter state's compensation act; they then sought further benefits pursuant to the Maine Act; award of benefits affirmed holding that Maine had a valid interest in protecting the interests of the resident workers); *Cramer v. State Concrete Corp.*, 39 N.J. 507, 189 A.2d 213 (1963) (award under the New York act does not bar the claimant's right to claim benefits under the New Jersey act).

"Relief may be awarded under the workmen's compensation statute of a State of the United States, although the statute of a sister state also is applicable." 9-141 Larson's Workers' Compensation Law § 141.02. Aside from the judge-made law allowing the worker choice of remedy, some compensation statutes give workers who have suffered injury as a result of the employer's intentional tort the explicit right to choose between tort and compensation remedies. In Kentucky and Maryland, for example, if the worker is injured as a result of the employer's deliberate intent to harm him or her, the workers' compensation statute permits the worker either to receive workers' compensation or to bring an action for damages against the employer. Ky. Rev. Stat. Ann. § 342.610(4) (Michie, LEXIS); Md. Code Ann., Lab. & Empl. § 9-509(d) (LEXIS). In other states, the worker does not even need to make such an election, but can pursue both remedies simulta-

neously. Among those jurisdictions, at least one allows the worker to keep both the compensation and any damages awarded. *Jones v. VIP Dev. Co.*, 15 Ohio St. 3d 90, 472 N.E.2d 1046 (1984) (application for and receipt of workers' compensation benefits does not preclude a common-law action for damages for an intentional tort, nor is the employer entitled to a set-off for the amount of compensation received by the worker). Other jurisdictions require that an offset be taken to avoid double recovery. See, e.g., *Gagnard v. Baldridge*, 612 So. 2d 732 (La. 1993) (worker is entitled to pursue both his or her remedy under the workers' compensation act and damages in a tort action for the intentional act of the employer. A worker injured by the intentional act of the employer need not risk the guaranteed benefits provided by the workers' compensation act, although the trial court must allow a credit against the civil tort judgment in an amount equal to the workers' compensation benefits paid).

C. ALLOWING SPECIFIC JURISIDICTION OVER A FOREIGN DEFENDANT WHO PLACES A DEFECTIVE PRODUCT IN THE STREAM OF COMMERCE ALLOCATES THE BURDEN AND RELATION OF HAZARD TO LIABILITY

Workers' compensation in America was seen as a new system that would help workers – a compromise whereby workers traded their (already limited) rights to go to court over work-related injuries for a system where they would no longer have to prove the employer was at fault for their injuries, a "no-fault" system that would provide automatic compensation for workplace injuries within certain limits. The theory was one of social efficiency - that the cost of injuries should be borne by the manufacturers rather than the worker, the worker's family or the government." A. Widman, Workers' Compensation A Cautionary Tale, p. 4 (2006). By 1949, every state had

passed new workers' compensation law, which created a system of compensation for injuries that did not allow going to court. Hammond and Kniesner, "The Law and Economics of Worker's Compensation," Rand Institute for Civil Justice, 1980.

The recent spate of legislation concentrates on lowering benefits, narrowing eligibility requirements, and putting medical treatment decisions in the hands of the insurance companies. According to Jim Ellenberger at the AFL-CIO's Department of Occupational Safety & Health, all "reform" campaigns sponsored by the insurance industry share the following criteria: insurance company control over the choice of physician; reliance on the more restrictive American Medical Association's Guides to the Evaluation of Permanent Impairment in order to rate injuries – a guide that was not written for this purpose and does not control for particulars of an injury; narrowing the definition of what qualifies as a condition eligible for compensation; much stricter criteria for "proving" a workplace injury; restrictions on attorney's fees; and restrictions on amount and duration of benefits received. See Jay Causey, "Worker's Compensation at the Turn of the Century," July 2000, available on-line at http://www.causeylaw.com/home.php?content=pub6.

Some specific ways the no-fault standard has been turned on its head are: requiring that work be more than 50 percent of the cause of the injury or illness; requiring that work be a "substantial contributing cause," or "major contributing cause" of the injury; requiring that an occupational injury or disease is "clearly work related" and "a substantial factor in the cause of" the resulting disability; and raising the standard of causation where there are preexisting conditions. McCluskey, Martha T., "The Illusion of Efficiency in Workers' Compensation 'Reform'," 50 Rutgers L. Rev 657, 792-93, n. 572-578 (1998).

Statutory compensation law provides a number of advantages to both workers and employers. A schedule is drawn out to stipulate the amounts and forms of compensation a worker is entitled to if she or he has sustained given kinds of injuries. Employers buy insurance against such occurrences. However, the specific form of the statutory compensation scheme may provide detriments. Statutory schemes often award a set amount based on the types of injury. These payments are based on the ability of the worker to find employment in a partial capacity: a worker who has lost an arm can still find work as a proportion of a fully-able person. This does not account for the difficulty in finding work suiting disability. When employers are required to put injured staff on "light-duties" the employer may simply state that no light duty work exists, and sack the worker as unable to fulfill specified duties. When new forms of workplace injury are discovered, for instance: stress, repetitive strain injury, silicosis; the law often lags behind actual injury and offers no suitable compensation, forcing the employer and worker back to the courts. Finally, caps on the value of disabilities may not reflect the total cost of providing for a disabled worker. The government may legislate the value of total spinal incapacity at far below the amount required to keep a worker in reasonable living conditions for the remainder of his life.

The United States workers' compensation system places the cost of work related injuries on a particular class of consumers, and thus there exists a relation between the hazardousness of particular industries and the cost of the system to that industry and consumers of its product. "In the United States it is more precise to say that the consumer of a particular product ultimately pays the cost of compensation protection for the workers engaged in its manufacture." 1-1 Larson's Workers' Compensation Law § 1.04.

"An integral and important part of the benefit scheme of all compensation acts is the provision of hospital and medical benefits. These benefits account for about 45 percent of the total benefits paid to injured workers. In forty-five states, District of Columbia and Puerto Rico, and under the Longshore and Harbor Workers' Act, and the Federal Employees' Compensation Act, such benefits are unlimited as to duration and amount. It is interesting to observe that in the space of about forty years the number of states providing full medical coverage has risen from about a dozen to almost four times that number. This appears to evince agreement with the finding of an authoritative study that 'it is impossible fully to relieve pain and to assure restoration of seriously disabled persons when medical care is arbitrarily limited. Equally important is the convincing evidence that unlimited medical benefits are economically the soundest benefit; that over the long term, they become the least expensive.'" 5-94 Larson's Workers' Compensation Law § 94.01 (citations omitted).

It is clear that workers who are permanently disabled are not getting enough compensation and the compensation duration is too short. Data consistently shows that a worker injured at the workplace earns significantly less than before the injury, even after returning to work. For example, according to one Rand Institute for Civil Justice Study, "permanent partial disability claimants injured in 1991-1992 [in California] received approximately 40 percent less in earnings over the four to five years following their injuries than did their uninjured counterparts." Rand Research Brief, "Compensating Permanent Workplace Injuries," 1998. Moreover, "for workers with minor disabilities, benefits replace a small fraction of lost wages." An earlier Rand ICJ report, released in 1991 found that "injured workers recovered a lower percentage of their accident costs than all accident victims

(54.1%) and that workers' compensation only compensated about 30% of the costs of long-term disabilities from work accidents." Rand Research Brief, "Compensating Permanent Workplace Injuries," 1998. If an injured worker is unable to find suitable work at all, the results are even worse because wage loss continues, yet many benefits run out. The system simply does not work for the permanently disabled. 50 Rutgers L. Rev. 657, 699 (1998) n. 156, 157 (citing Deborah R. Hensler et al., Comensation for Accidental Injuries In the United States 107 fig. 4.8 (1991). "This court repeatedly has upheld the authority of the States to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the worker." *New York Cent. R.R. v. White*, 243 U.S. 188, 200 (1917).

"[D]ecisions have established the propositions that the rules of law concerning the employer's responsibility for personal injury or death of a worker arising in the course of employment are not beyond alteration by legislation in the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one worker for the negligence of another and respecting contributory negligence and assumption of risk are subject to legislative change." *Arizona Employers' Liability Cases*, 250 U.S. 400, 419 - 20 (1919). Accordingly, a state statute which provided an exclusive system to govern the liabilities of employers and the rights of workers and their dependents to compensation for disabling injuries and death caused by accident in certain hazardous occupations, was held not to work a denial of due process in rendering the employer liable irrespective of the doctrines of negligence, contrib-

utory negligence, assumption of risk, and negligence of fellow-servants, nor in depriving the worker or his dependents of the higher damages which, in some cases, might be rendered under these doctrines. *New York Central R.R. v. White*, 243 U.S. 188 (1917); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917). In determining what occupations may be brought under the designation of "hazardous," the legislature may carry the idea to the "vanishing point." *Ward & Gow v. Krinsky*, 259 U.S. 503, 520 (1922).

Likewise, an act which allowed an injured worker an election of remedies permitting restricted recovery under a compensation law although guilty of contributory negligence, and full compensatory damages under the Employers' Liability Act, did not deprive an employer of his property without due process of law. *Arizona Employers' Liability Cases*, 250 U.S. 400 (1919).

The American Insurance Association proudly announces on its web site: "AIA has provided leadership in efforts to achieve reforms in workers' compensation programs in 30 states since 1992. While AIA is encouraged by the recent improvement . . . in the workers' compensation line, we recognize the need for ongoing involvement in workers' compensation reform and system administration. AIA is working to resist efforts to undermine reforms through legislative proposals or ballot initiatives." Reform through legislative efforts further diminishes the injured worker's right to justice. To diminish these rights further through erosion of the right of recovery against third party foreign defendants, would erode the *quid pro quo* bargain further and leave the injured worker without complete justice. Therefore, holding that the exercise of specific jurisdiction over foreign defendants, who place defective products in the stream of commerce is proper, would absolutely comport with fair play

and substantial justice, and would provide a more perfect remedy for injured workers, employers, insurance companies, and ultimately the United States consumers.

D. FULL FAITH AND CREDIT UNIFIES THE LEGAL REMEDIES

The purpose of the Full Faith and Credit Clause was to eliminate conflicts between States by requiring them to honor one another's judgments. Recognizing such exceptions would allow one State to substitute its judgment for that of the rendering State, contrary to the clear command of Article IV, Section 1 and 28 U.S.C. § 1738 that "Full" faith and credit be given state court judgments. The Full Faith and Credit Clause was a critical component of the Constitution's plan to transform the States from independent sovereigns into a unified nation. The Clause was to be a nationally unifying force "to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of state of its origin." *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 276-77 (1935).

The Full Faith and Credit Clause provides that:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const., Art. IV, § 1. The Constitution ensured that the Full Faith and Credit Clause would receive uniform application among the States — a point that James Madison emphasized. See THE FEDERALIST NO. 42 (Madison).

This Court by holding that purposeful availment of the market of the United States as a whole, which creates general jurisdiction over federal claims, also creates specific jurisdiction in a state in which the harm occurs as a result of purposeful availment of the national market, would assure that every foreign defendant will receive uniform application of the law among the States and be treated in the same manner and to the same requirements of manufacturers in the United States. Furthermore, it will even the playing field between the United States manufacturers and the foreign manufactures as to liability for defective products and afford recognition and uniform application of the legal remedies to an injured worker due to the defective product.

E. DUE PROCESS REQUIRES A LEVEL PLAYING FIELD FOR ALL MANUFACTURERS OF DEFECTIVE PRODUCTS

At the time of the Constitution, sovereign States unquestionably enjoyed immunity for their ministers in the courts of foreign States. See Michael B. Rappaport, Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions, 93 Nw. U. L. Rev. 819, 821 (1999) ("In 1789, the word 'State' denoted an independent country that possessed complete or a significant degree of sovereignty."). In *Schooner Exchange v. McFaddon*, 7 Cranch (11 U.S.) 116 (1812), the Court recognized that sovereign States had territorial jurisdiction over foreign sovereigns and their ministers, but mutually waived that jurisdiction in furtherance of their mutual interest and intercourse.

> This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in

> which every sovereign is understood to wave [sic] the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

Id. at 137; See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) ("For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country"). Specifically with regard to ministers representing a Sovereign in a foreign State, the Court meticulously delineated the reasons for their immunity.

> The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission.

Schooner Exchange, 11 U.S. at 138-139. Thereafter, the Full Faith and Credit Clause transformed the respect that a forum state must show the sovereignty interests of other states from a matter of comity into a constitutional mandate. A specific provision of the Constitution speaks to whether a forum State must honor the sovereignty interests of other States. The Full Faith and Credit Clause altered the basis under which forum States had waived their absolute territorial jurisdiction over the sovereignty interests of other States, requiring respect both for their "public Acts" and "judicial proceedings." Art. IV, § 1. The Clause set in constitutional stone their mutual commitment to treat each other as coequals in a cooperative federal system. That mutual commitment transformed the

obligation to give full faith and credit from a matter of comity into a constitutional imperative. Justice Scalia emphasized that with the Full Faith and Credit Clause a constitutional mandate had replaced the comity formerly granted under international practice.

The Court initially required forum States to credit other States' laws based on territorialist choice-of-law principles. See *Bradford Electric Light & Power Co. v. Clapper*, 286 U.S. 145 (1932). It then moved to a balancing of interests test which it subsequently abandoned in favor of the current rule that allows the forum State the presumptive right to apply its own law as long as it had sufficient contacts with the case. *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935) ("the conflict is to be resolved . . . by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight."); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.10 (1981) ("the Court has since abandoned the weighing-of-interests requirement.").

It is well settled that "a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985); see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("A judgment rendered in violation of due process . . . is not entitled to full faith and credit elsewhere"); *Hanson v. Denckla*, 357 U.S. 235, 255 (1958) ("Delaware is under no obligation to give full faith and credit to a Florida judgment . . . offensive to the Due Process Clause of the Fourteenth Amendment"); *Williams v. North Carolina*, 325 U.S. 226, 230 (1945) (opinion of the Court by Frankfurter, J.) (denying Full Faith and Credit because "those not parties to a litigation ought not to be foreclosed by the interested actions of others"); Restatement (Second) of Conflict of Laws § 104 (1969) ("A

judgment rendered without judicial jurisdiction or without adequate notice or adequate opportunity to be heard will not be recognized or enforced in other states.").

However, personal jurisdiction complies with due process when the nonresident defendant has purposefully established minimum contacts with the forum state, and the exercise of jurisdiction will not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). There should be no territorial limits on the power of the states to exercise adjudicatory jurisdiction. Therefore, foreign defendants should be held to the same standard of liability and responsibility for defective products as their domestic counterparts. Jurisdictional forbearance would preclude the injured worker from bringing the foreign defendants to justice in the jurisdiction where the harm occurs. It is the right of every worker to have equal access to justice in these United States.

CONCLUSION

It is inevitable, in this age of internationalization of commerce, that workers who work in the United States will be exposed to harm by defective products. When a worker is harmed by defective products in the workplace, the worker, the employer, the insurance carrier, and ultimately the consumer will prevail when an injured worker is able to bring an action against the foreign defendant who placed the defective product in the stream of commerce in the United States. An injury is reasonably foreseeable. A law suit is reasonably foreseeable. Personal jurisdiction is fundamental and quintessential to satisfy the rights afforded the citizens of the United States under the United States Constitution. To fail to so find offends all notions of equity and justice. For the foregoing reasons, the judgment of the Supreme Court of New Jersey should be affirmed.

Respectfully submitted.

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